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Russell West Jr.

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MIKHAIL BAKHTIN AND CHANGE IN THE COMMON LAW

Russell West Jr.

Abstract: Traditional legal analysis comprehends change in the common law over time as a shifting legal response to different facts and circumstances. This approach does not examine the internal mechanisms by which the meaning of a judicial opinion changes when cited in later legal writing. Mikhail Bakhtin, a literary and cultural theorist, argued that any statement can be understood only through the context in which it is uttered and that every change in context causes a shift in the statement's meaning. This Comment analyzes the internal mechanisms of judicial opinions in light of Bakhtin's theories. First, this Comment describes one example of the general use of literary theory in legal analysis and through that example places Bakhtin's work within the context of law and literature. Then, this Comment examines the effect of citation throughout a line of product liability cases to illustrate the semantic shift described in Bakhtin's theories and concludes by arguing that Bakhtin's theories offer a useful extension of the application of literary theory to legal analysis.

*Can we learn to ask of a particular opinion how it creates its own authority, and what kind of conversation it establishes, with what relation to democracy?*¹

A first-year law student is trained to analyze precedent in order to argue a legal conclusion from a given set of facts. That student rarely goes beyond the surface reasoning of the judicial opinions that make up the bulk of the texts encountered in the first year of law school. Often, that first-year student faces inconsistent opinions or unexplainable changes in the common law over time. One traditional approach to analyzing these inconsistencies has been to see the function of legal opinions as balancing the need for continuing clear statements of the law with the need to address changing social conditions. This view positions the law somewhat apart from the society in which it operates and assumes that society acts upon the law in generating these changes.

Alternatively, the use of literary theory in legal analysis offers a means to describe changes in the common law in terms relative to the judicial opinion itself. As authors, judges seem to create opinions as texts that can be analyzed using methods appropriated from literary analysis. As Professor White's² question above indicates, literary analysis asks

1. James Boyd White, *Justice as Translation: an Essay in Cultural and Legal Criticism* 112 (1990) [hereinafter *Justice*].

2. Because of the repetition of names, this Comment consistently refers to James Boyd White as "Professor White" and to Justice Byron White as "Justice White." Any reference simply to "White" is to the defendant in *United States v. White* or to the case itself.

questions of the opinion itself as a text created by an author in a certain moment. While fruitful, many literary analyses of law are static because they apply literary theories to one text, or a series of texts, frozen in time. However, this analysis neglects relations over time. Texts are influenced by those that precede them and influence those that follow them. Additionally, each text's journey through time subjects it to shifts in meaning engendered by those who use the traveling text when authoring their own texts.

Judicial opinions are particularly subject to these changes. When an author cites a judicial opinion, the cited opinion must support the author's interpretation of the cited text. While literary theory provides an analysis that carefully describes the uses of texts within an opinion, the continuing relationship between the cited text and the citing text, a relationship that forever effects the meaning of both texts, has not been as carefully described.

The cultural and literary theories of Mikhail Bakhtin provide helpful tools for describing this relationship.³ Bakhtin argued that any statement's meaning is necessarily related to the context in which the statement is uttered; any movement of this statement to a new context carries a necessary shift in meaning. This condition, which Bakhtin called "heteroglossia,"⁴ defines a dialogic world. "Dialogism,"⁵ the mode through which knowledge is created under heteroglossia, excludes the

3. The theories of Mikhail Bakhtin (1895–1975) have since 1970 "exerted a spellbinding and fertile power over critical imaginations in North America and Europe." David H. Richter, *The Critical Tradition* 780 (1989) (placing Bakhtin in context of modern literary criticism). For a complete bibliography of Bakhtin's works, see Tzvetan Todorov, *Mikhail Bakhtin: the Dialogical Principle* 121–23 (1984). The most common introduction to Bakhtin's work is through his essay Mikhail Bakhtin, *Discourse in the Novel*, in *The Dialogic Imagination: Four Essays by M.M. Bakhtin* 259 (Michael Holquist ed., Caryl Emerson & Michael Holquist trans., 1981) [hereinafter *Discourse*]. Although Bakhtin addresses the social context of statements more thoroughly and explicitly in his essays Mikhail Bakhtin, *The Problem of Speech Genres*, in *Speech Genres and Other Late Essays* 60–102 (1986) and Mikhail Bakhtin, *The Problem of the Text*, in *Speech Genres and Other Late Essays* 103–31 (1986), this Comment uses ideas discussed in *Discourse*, *supra*, at 337–55.

4. Literally, heteroglossia refers to the different explanations of a word's meaning: "At any given time, in any given place, there will be a set of conditions—social, historical, meteorological, physiological—that will insure that a word uttered in that place and at that time will have a meaning different than it would have under any other conditions . . ." Mikhail Bakhtin, *The Dialogic Imagination: Four Essays by M.M. Bakhtin* 428 (Michael Holquist ed., Caryl Emerson & Michael Holquist trans., 1981) [hereinafter Holquist, *Dialogic Imagination*].

5. Dialogism describes the relationship between utterances: "Everything means, is understood, as a part of a greater whole—there is a constant interaction between meanings, all of which have the potential of conditioning others. Which will affect the other, how it will do so and in what degree is actually settled at the moment of utterance." *Id.* at 426.

possibility of monologue—any statement standing on its own. That is, no statement can be understood without knowing the context in which the statement is uttered, without understanding the dialogue of which that statement is only part.

In applying Bakhtinian analysis to the common law as it changes over time, one begins by noting that any citation appropriates the cited opinion for the purposes and meanings of the citing opinion. This new context effects a shift in meaning on the cited opinion; the cited opinion will now be understood always in the context of its newest citation.⁶ A Bakhtinian analysis begins to describe how this shift in meaning takes place through the relationship of one opinion to the other.

This Comment argues that Bakhtin's theories present a valuable addition to the use of literary theory in legal analysis. Part I offers James Boyd White's *Justice as Translation* as an example of the current use of literary theory in legal analysis⁷ and describes Bakhtin's theories in relation to the analysis used by Professor White. Part II then analyzes a line of product liability cases under Bakhtinian theories to describe the literary relationship between judicial opinions that continues over time and has a profound effect on change in the common law.

I. LAW, LITERATURE, AND BAKHTIN

Law and Literature is an expanding field, one of several responses to mainstream legal thinking that has developed in recent years. This Comment describes only a small part of the Law and Literature field: part of Professor White's work is used as a link between Mikhail Bakhtin's theories and the broader corpus of Law and Literature analysis.

In moving from literary studies to legal studies, Professor White was struck by "how similar the two enterprises were In particular, the habits of close reading and textual analysis developed in literary studies seemed very close to those required by legal training."⁸ One of the fruits of Professor White's efforts in bringing literary analysis to bear on legal scholarship has been to afford legal analysis more opportunities than were previously available.⁹

6. *Discourse*, *supra* note, 3 at 340.

7. *Justice*, *supra* note 1, at 160–75.

8. *Id.* at 17.

9. *Id.* Recognizing the literary nature of law recognizes and explores the limits placed on law's creation of meaning: "What I have called the literary view of language . . . is that all languages are

A. Common Law Interpretation

Professor White describes law as a culture, providing a link to Bakhtin's theories.¹⁰ When law is viewed as a culture, it becomes less a way of administering society or adjudicating disputes and more a way of making sense of the world.¹¹ In particular, Professor White describes law as a "culture of argument," but the argument is not a brawl. Rather, the argument in this culture is a resolution of conflicting ways of making sense of the world.¹²

One method by which this resolution takes place is in memorializing adjudications in judicial opinions.¹³ Unique to law, a judicial opinion becomes an authoritative text that brings its particular resolution to the service of those adjudicating later conflicts, carrying forward the cultural assumptions of the earlier legal discussion.¹⁴ Professor White brings a literary analysis to these texts after placing his criticism between two opposing traditions of legal analysis: a "craft" tradition and a "realist" tradition.¹⁵

Professor White describes the craft tradition as ingrained in lawyers from the first day of law school. Their training allows them to distinguish good opinions from bad opinions with no great analysis of the means by which that distinction is made. A lawyer is trained in her craft by a study of examples of craftsmanship. In a law school classroom, the professor presents an opinion and uses various methods to point out its flaws. Although this general approach might not seem to offer the future lawyer examples of good craftsmanship, the negative examples allow a lawyer to examine her own legal reasoning and writing for similar flaws.¹⁶ In

limited; that none says the whole truth; that full translation from one to the other is always in a deep sense impossible." *Id.* at 81.

10. "For me it is more valuable to think of law in a third way, as a culture—as a "culture of argument"—or, what is much the same thing, as a language, as a set of ways of making sense of things and acting in the world." *Id.* at xiii.

11. *Id.*

12. *Id.* at xiii–iv.

13. *Id.* at xvi.

14. "I read these opinions as cultural and rhetorical texts, that is, with an eye to the kind of political and ethical community they build with their readers and to the contribution they make to the discourse of the law." *Id.*

15. *Id.* at 93–97.

16. *Id.* Professor White states:

[L]aw teachers will work over a judicial opinion, testing its "reasoning," looking for omissions or weak arguments and the like, and leave the class with a sense, usually, of cefectiveness. . . .

contrast, the realist tradition disregards the opinion and its craft to look at the result, “piercing the felt artificiality of the words to reach the ‘reality’ that lies behind the facade.”¹⁷ The realists redirect attention from the craft exhibited by the judge in writing an opinion to the effect of the holding in the world. Various social science methods shift the focus of legal analysis to the effect of judicial holdings.¹⁸

Professor White criticizes both methods for failing to pay attention to each other. The craft tradition offers no language to criticize opinions while the realist tradition forgets that opinions are more than just holdings.¹⁹ Professor White offers the literary tradition of locating an author in a particular moment when writing a particular text as one method that addresses these failures.²⁰

1. *Law and Literature*

*I start with poetry because it seems largely built on the principle I have articulated, that we put two things together in such a way as to make a third—different from the others yet respectful of them—with a meaning of its own.*²¹

Professor White uses poetry to explain the literary activity he pursues in a legal analysis. Primarily, he argues that the constant attention to the legal text, the constant rereading, works to bring the legal text into our consciousness much as rereading a poem brings that “verbal artifact” into our consciousness.²² This process severs our experience of the text from one moment of reading and attaches it to the reconstructed reading that is the result of many encounters with the text.²³ Law, like a poem, establishes the author’s voice, recognizes and constructs a certain

But the students are to imagine themselves doing it better and it is in this imagined compositional process that the center of a legal education can be found.

Id. at 94.

17. *Id.* at 95.

18. *Id.* Examples of social sciences applied to legal analysis include sociology, psychology, and economics. *Id.*

19. *Id.* at 94–95.

20. *Id.* at 96.

21. *Id.* at 4.

22. *Id.* at 7.

23. *Id.*

community of readers, and creates certain possibilities of language and expression.²⁴

Rather than using literature to prove "the inhumanity of law" or using critical theory to carry on its own debates in a legal environment, Professor White proposes to explore how the two fields might be put together into a third method.²⁵ The interpretative nature of law indicates that a literary analysis might be fruitful.²⁶ Professor White articulates three points of attention within his literary analysis. First, he examines the writer's language and culture.²⁷ Second, he examines the art by which an author reconstitutes language and culture in her work.²⁸ Third, he examines the community of readers an author establishes through the text she creates and offers to those readers.²⁹ Professor White explored the majority and dissenting opinions in *United States v. White*³⁰ to demonstrate how attention to these three points in action helps explain a range of traditional common law interpretations.

2. *United States v. White*

In *White*, a government informant carried a concealed transmitter while engaging the defendant in conversations regarding narcotics trafficking.³¹ Although the informant did not testify at trial, the agents who overheard the conversations through the transmitter did.³² The Court held that because the Fourth Amendment does not protect against

24. *Id.* at 8–16. For more about the literary nature of law, see *supra* text accompanying notes 8–9.

25. "My initial question was: What happens if we look at the literature of the law as if it really were literature, as though it defined speakers and a world, a set of possibilities for expression and community?" *Justice, supra* note 1, at 17.

26. *Id.* at 97. An example of the new method of legal analysis created by Professor White's bringing literary theory to bear on legal texts is described in his view of Justice Brandeis's method of interpreting the Constitution:

In this enterprise, as Brandeis defines it, everything is involved: the intellect, the capacity to read and express, the ability to penetrate surface forms to underlying truths, the sensitivity to shifts in social and intellectual forms, all in the service of the wise and just definition of the individual and his government. The reading of the Constitution is in fact a stage in the making of the Constitution

Id. at 156.

27. *Id.* at 99.

28. *Id.*

29. *Id.*

30. 401 U.S. 745 (1971).

31. *Id.* at 746–47.

32. *Id.*

confiding in an unworthy associate, regardless of the level of surveillance employed, no prohibited seizure had taken place.³³ Justice White wrote the opinion for the Court, while Justice Douglas and Justice Harlan wrote dissenting opinions.

While discussing Justice White's majority opinion, Professor White noted that Justice White distilled a line of precedential cases into simple propositions of law:

This is almost a caricature of old-fashioned common-law adjudication. The cases all are authoritative, and until overruled equally so. They stand for propositions; the sole task of the court is to arrange those propositions in logical patterns of non-contradiction and to fit the present case within them. All authority is in the past, in the earlier cases. The function of the Supreme Court, including the present opinion, is to produce a series of tags that tell you how future cases should be decided.³⁴

In dissent, Justice Douglas took an approach that avoided Justice White's legalism. Citing precedent as progress towards a more enlightened present, not as rules to follow regardless of current circumstance, Justice Douglas did not distinguish between levels of surveillance. Rather, he found that the Fourth Amendment required a warrant for any kind of electronic eavesdropping.³⁵

Professor White found fault with both Justice White's and Justice Douglas's opinions. Justice Harlan's dissent, however, Professor White declared a "lesson in the reading of precedent."³⁶ While agreeing with Justice White that the basic question was the degree precedent would be binding on the current situation, Justice Harlan read the previous cases more as struggles to be understood in their context than as simple statements of rules.³⁷ The struggle, in any case, is to find the principles laid down in precedent that will guide the judgment in the current case.³⁸ Professor White called Justice Harlan a "responsible and intelligent reader" of precedent, "far better than the literalist White or the simplistic Douglas."³⁹ Agreeing with Justice Harlan that the past must mean

33. *Id.* at 751-54.

34. *Justice*, *supra* note 1, at 164.

35. *White*, 401 U.S. at 756-66 (Douglas, J., dissenting).

36. *Justice*, *supra* note 1, at 168.

37. *White*, 401 U.S. at 768-72 (Harlan, J., dissenting).

38. *Justice*, *supra* note 1, at 169-70.

39. *Id.* at 171.

something new when read in the present, Professor White argued that "[a]uthority thus lies in a kind of respectful interaction between mind and material, past and present, in which each has its proper contribution to make"⁴⁰

Professor White's conclusion about the reading of precedent disregards, however, how Justice Harlan's use of precedent changes the meaning of the preceding case. Professor White and Justice Harlan assume that the meaning intended by the original author never changes. For them, the question is simply how that meaning is to be applied in this new context. However, this assumption treats precedent as frozen in time and ignores the relation of cases through time, a relationship that shifts meaning.

3. *A Fourth Point of Attention*

Justice Douglas plainly referred to cultural thoughts on surveillance,⁴¹ but Professor White noted that Douglas's lack of connection to legal authority would "flunk a law school exam."⁴² Although Professor White recognizes the community addressed by Justice Douglas and faults Justice White for ignoring that community, his analysis of *United States v. White* limits its examination to the relations between opinion and community when the opinions were written; consequently his analysis remains frozen in time. Professor White assumes precedent created a fixed meaning addressed in different ways by the authors of the *White* opinions. However, a citing author changes the meaning of the cited precedent, in a manner consistent with the mechanisms of language described by the theories of Mikhail Bakhtin. This shift in meaning, created by bringing a previous text into a new context, is an important fourth point of attention for a literary analysis of legal thought.

B. *The Literary and Cultural Theories of Mikhail Bakhtin*

Mikhail Bakhtin was a Russian literary theorist whose work has been translated and digested in English within the last two decades, although his major works were written from 1910 to 1940.⁴³ Bakhtin noted and described the social context underlying every utterance, verbal or

40. *Id.* at 172.

41. *White*, 401 U.S. at 756-66 (Douglas, J., dissenting).

42. *Justice*, *supra* note 1, at 166.

43. *See supra* note 3.

written. In particular, he examined how previous utterances inhabit and shape current utterances: “Every conversation is full of transmissions and interpretations of other people’s words.”⁴⁴ This heteroglossia—the many explanations of meaning that are contained in any statement—requires an understanding of dialogism, which is the dominant mode of making meaning in a world pervaded by heteroglossia.⁴⁵ Sometimes, the use of another’s words is direct, sometimes indirect. At all times, however, the meaning of current utterances is shaped by the presence of those other words, while the meaning of other words are shaped by the context of the current utterance.⁴⁶

Bakhtin describes dialogue as a three-part structure: an utterance, a reply, and the relation between them.⁴⁷ An utterance is any use of language, and a reply is not necessarily verbal or even externalized; the reader’s enjoyment of a novel is a form of reply. The relation between utterance and reply, however, “is the most important of the three, for without it the other two would have no meaning. They would be isolated, and the most primary of Bakhtinian a prioris is that nothing is anything in itself.”⁴⁸ Because past statements cannot be understood in isolation from the context into which they are imported, the dialogical principle is used to analyze the use of another’s words in the speaker’s context.⁴⁹

When citing a case, lawyers incorporate another’s words into their own argument, the specialized discourse of lawyers. The dialogical principle readily analyzes this process. The present argument is obviously shaped by the cited precedent; however, the precedent is similarly shaped by its position in the present argument. Without analyzing both the present case and the argument, the meaning of the cited case cannot be determined, for citation subjects precedent to a shift in meaning.⁵⁰ Traditional legal analysis refuses to acknowledge changes in a case’s meaning over time. Nevertheless, the heteroglossic context

44. *Discourse*, *supra* note 3, at 338. This Comment frequently quotes directly from Bakhtin’s writing because he has a unique way of using language that is better transmitted by using his words directly. Also, the analyses to be applied to legal reasoning are better understood in his words than in descriptions of his complex writing. As this Comment argues, any citation will carry a shift in meaning; these quotations are an attempt to limit that shift while accepting its consequences. For more about those consequences, see *infra* text accompanying notes 60 and 61.

45. Heteroglossia refers to the different explanations of a word’s meaning. Dialogism describes the relationship between utterances. For further definitions, see *supra* notes 4 and 5.

46. See *Discourse*, *supra* note 3, at 338.

47. Michael Holquist, *Dialogism: Bakhtin and his World* 38 (1990).

48. *Id.*

49. See generally *id.* (providing excellent description and analysis of Bakhtin’s work).

50. See *infra* part I.B.1.

operates on all uses of another's words and brings new, even unintended, meanings into the cited case. A dialogical analysis illuminates these meanings.

Bakhtin discussed the fluidity of this relationship between the discourse introduced and the new context:

Another's discourse, when introduced into a speech context, enters the speech that frames it not in a mechanical bond but in a chemical union (on the semantic and emotionally expressive level); the degree of dialogized influence, one on the other, can be enormous. For this reason we cannot, when studying the various forms for transmitting another's speech, treat any of these forms in isolation from the means for its contextualized (dialogizing) framing—the one is indissolubly linked with the other.⁵¹

Precedent, simply by importing another's words into the present argument, plays the role Bakhtin assigned to quotations. Rather more directly than in common speech, however, these quotations and interpolations are formally recognized. Although citation and its forms may seem to protect the quoted precedent from distortion, any use of another's words can be understood only against the new background, and understanding the dialogizing background begins with the simple question, "Why is this bit of text being quoted?"⁵² In everyday conversation, listeners make minute judgments about the use of another's words in the conversations they hear and overhear.⁵³ In courtrooms, chambers, classrooms, and offices, legal analysis constantly focuses on the "why" of citation. When encountering claimed supporting authority, judges, clerks, students, and lawyers will investigate the case cited and determine if the citation actually agrees with the words of the cited case.

51. *Discourse*, *supra* note 3, at 340.

52. *Id.* at 299–300.

Thus a prose writer can distance himself from the language of his own work, while at the same time distancing himself, in varying degrees, from the different layers and aspects of the work. The prose writer makes use of words that are already populated with the social intentions of others and compels them to serve his own new intentions, to serve a second master.

Id.

53. For example, the listener's evaluation of gossip is an everyday evaluation of a speaker using another's words.

1. Semantic Shifts in Meaning

*The following must be kept in mind: that the speech of another, once enclosed in a context, is—no matter how accurately transmitted—always subject to certain semantic changes. The context embracing another's word is responsible for its dialogizing background, whose influence can be very great.*⁵⁴

The misuse of quotations is familiar to everyone. Methods for placing words in another context can completely change the meaning of a quotation: “[a]ny sly and ill-disposed polemicist knows very well which dialogizing backdrop he should bring to bear on the accurately quoted words of his opponent, in order to distort their sense.”⁵⁵ Traditional legal thinking warns against such use; as a caution, judges and analysts routinely ask “[h]ow are the facts of that case applicable to those of the present?”⁵⁶

The relation between the prior utterance and its new context, however, requires that the prior utterance cannot be understood outside the new context at that moment. When the judge asks why this case is cited, she answers with the present case foremost in her mind: “In order to assess and divine the real meaning of others’ words in everyday life, the following are surely of decisive significance: who precisely is speaking, and under what concrete circumstances?”⁵⁷

The new concrete circumstances will shade the prior words with new purpose, and thus the quotation becomes susceptible to a shift in meaning, however slight. Bakhtin’s view of the “speaking person” clarifies this process.⁵⁸ The speaking person is commonly viewed as a transmitter of knowledge; for example, as we imagine a professor in front of a classroom. A professor is imagined as holding knowledge that she transmits to her students by speaking to them. Bakhtin, however, viewed the speaking person as the “subject for the engaged, practical transmission of information, and not as a means of representation.”⁵⁹ A professor in front of a classroom is not transmitting information to her students, but is becoming a part of the internal conversation each of her students is having about the information she speaks.

54. *Discourse*, *supra* note 3, at 340.

55. *Id.*

56. *Winterbottom v. Wright*, 152 Eng. Rep. 402, 405 (Ex. 1842) (Alderson, B., concurring).

57. *Discourse*, *supra* note 3, at 340.

58. *Id.*

59. *Id.*

A judicial opinion is another representation of a speaking person and is part of the engaged transmission of information Bakhtin describes. Engagement with a judicial opinion is easier to imagine than a professor entering her students' minds: as one reads a judicial opinion, one converses with it, either in one's head or perhaps by making margin notes or using differently colored highlighters. The opinion is not merely the transmitter of information but also part of our dialogue about the transmitted information.

The transmission of information takes place in many modes, each subjecting the representation of the speaking person to the demands of transmission in that mode. Bakhtin recognized two modes that appear in teaching language-based disciplines that will be recognized by anyone who has gone to law school: "'reciting by heart' and 'retelling in one's own words.'"⁶⁰ The latter task illustrates quite clearly how the representation of the speaking person becomes a subject of the student's dialogue, for the words retold must adhere to the original speaker's meanings but also must transmit new meanings as well.⁶¹ However, this very requirement, to join one's own meaning with the meaning of those who spoke before, illustrates how the appropriation of another's speech into one's own, and the added and shifted meanings resulting from the process, underlies an individual's ideological becoming.⁶²

2. *Ideological Becoming*

As an individual appropriates others' discourse into one's own discourse, the appropriated discourse affects one's previously developed

60. *Id.* at 341.

61. *Id.* "The latter mode poses on a small scale the task implicit in all prose stylistics: retelling a text in one's own words is to a certain extent a double-voiced narration of another's words, for indeed 'one's own words' must not completely dilute the quality that makes another's words unique" *Id.*

62. Bakhtin describes the "ideological becoming" of a human being as that being's creation of her own idea system. Ideological becoming, in part, is a struggle between two types of discourse, "authoritative discourse" and "internally-persuasive discourse" as they are appropriated into one's own language and belief systems. *Id.* at 342-46. Authoritative discourse:

[I]s privileged language that approaches us from without; it is distanced, taboo, and permits no play with its framing context (Sacred Writ, for example). . . . It has great power over us, but only while in power; if it ever becomes dethroned it immediately becomes a dead thing, a relic. Opposed to it is *internally-persuasive discourse*, . . . which is more akin to retelling a text in one's own words, with one's own accents, gestures, modifications.

Holquist, *Dialogic Imagination*, *supra* note 4, at 424.

and continually developing belief systems.⁶³ Ideological development occurs when another's words begin to lose their merely descriptive purpose and "strive[] rather to determine the very bases of our ideological interrelations with the world, the very basis of our behavior"⁶⁴ In a sense, words that had merely described positions encountered in the world come to explain positions held for oneself. Just as individuals exhibit an ideological becoming through their appropriation of the language of others, the law alters its rules as each of the law's authors appropriate precedent and apply it to the case at hand.

Within a judicial opinion, this sense of ideological becoming appears as the position argued by one side comes to explain the holding of the court. This process, so familiar as to be almost unnoticed, masks the movement of meaning in the opinion. As precedent is cited by litigants, it is invested with authority. Should the court decide the precedent applies to the present case, it becomes persuasive. This movement in meaning matches that described by Bakhtin.⁶⁵ As another's words shift in meaning during an individual's ideological becoming, so does the meaning of cases cited in judicial writing. Moreover, the words of others are rarely both authoritative and internally persuasive on an individual level.⁶⁶ In judicial opinions, however, precedent is usually assumed to be both authoritative (carrying the weight of law) and internally persuasive (applying to the given set of facts). Before exploring the tensions between these two positions for precedent, each position will be analyzed individually.

a. Authoritative Discourse

Authoritative discourse, coming from outside the speaker, always precedes the current discourse; it is older and ranks higher.⁶⁷ Further, "[t]he authoritative word demands that we acknowledge it[,] . . . it binds us, quite independent of any power it might have to persuade us internally; we encounter it with its authority already fused to it[,] . . . organically connected with a past that is felt to be hierarchically

63. Ideological becoming should not be confused with political development of any sort. "Ideology" in Russian is simply an idea-system. But it is semiotic in the sense that it involves the concrete exchange of signs in society and in history. Every word/discourse betrays the ideology of its speaker" Holquist, *Dialogic Imagination*, *supra* note 4, at 429.

64. *Discourse*, *supra* note 3, at 342.

65. *See id.* at 340–41.

66. *Id.* at 342. Authoritative and internally persuasive discourse are defined *supra* note 62.

67. *Discourse*, *supra* note 3, at 342.

higher.”⁶⁸ Use of legal precedent appears authoritative, particularly in the form of citation. The use of complicated forms to cite authority demands attention and allegiance. Lawyers must know the sources of their authority and through these sources prove the strength of the cited authority. Bakhtin’s note that authoritative discourse may “organize around itself great masses of other types of discourses (which interpret it, praise it, apply it in various ways) . . .”⁶⁹ describes the vast material surrounding the case and statutes that constitute the law.

When cases and statutes are incorporated into new discourses of the law, either commentary or later cases, citation form insures that the authoritative discourse of the law will not intermingle with the discourse surrounding the citation. Here, another’s words—in the form of earlier law—enter the present argument “as a compact and indivisible mass.”⁷⁰ Its strength in the present argument rests on the validity of its authority; hence, the constant search for updated statutes and rulings.

“Authoritative discourse cannot be represented—it is only transmitted.”⁷¹ Bakhtin asserts this limit while discussing how authoritative discourse appears in novels. Because novels are an artistic form, interested in representing more than transmitting, authoritative discourse has little import for novels.⁷² However, the static nature of authoritative discourse has effects within law, a genre of authoritative texts. When cited, authoritative discourse becomes subject to the discourses surrounding it; in a case, precedent is interpreted by briefs and opinions. Eventually the interpretations guide whether the precedent cited will become persuasive.

b. Internally Persuasive Discourse

In an individual’s ideological becoming, one begins to distinguish between one’s own discourse and others’ discourses, at first creating “a separation between internally persuasive discourse and authoritarian enforced discourse, along with a rejection of those congeries of discourses that do not matter to us, that do not touch us.”⁷³ Internally persuasive discourse expresses values held true even if “backed up by no

68. *Id.*

69. *Id.* at 343.

70. *Id.*

71. *Id.* at 344.

72. *Id.*

73. *Id.* at 345.

authority at all . . . not even acknowledged in society (not by public opinion, nor by scholarly norms, nor by criticism), not even in the legal code.”⁷⁴ As new situations appear, the appropriate authoritative discourse is integrated to some degree with our internal discourse, creating new discourses that guide our responses. Although authoritative discourses are finite and fixed, “[t]he semantic structure of an internally persuasive discourse is *not finite*, it is *open*; in each of the new contexts that dialogize it, this discourse is able to reveal ever newer *ways to mean*.”⁷⁵ As each case presents cited precedent, the legal rules are extracted and applied to a new fact pattern; internal persuasion is drafted from authority. The law also appropriates discourses from outside its recognized line of precedent and recognizes their persuasiveness. For example, many a judicial opinion relies on the public interest served by the decision reached in the opinion.⁷⁶

The interplay between authoritative discourse and internally persuasive discourse in the law is often discussed, even in basic legal analysis. First-year students are taught to find each case’s rationale. Bakhtin’s discussion of an individual’s ideological becoming, however, offers legal analysis an important understanding of the change in meaning over time that examining each individual opinion’s rationale ignores. As the common law develops over time, as its belief system shifts over decades, the citation of precedent changes the meaning of that precedent. Opinions cited in a later case will never mean what they once meant, and that shift will affect future developments in the law’s ideology. One example of a line of product liability cases spanning over a century illustrates this shift.

II. AN EXAMPLE OF CASE ANALYSIS

A. *The Brief Story of a 1L*

Basic Legal Skills is the first-year legal writing and research course at the University of Washington School of Law; the course would be familiar to any law school student or graduate. Basic Legal Skills teaches the writing, research, and analysis necessary for the first-year study of substantive and procedural law.

74. *Id.* at 342.

75. *Id.* at 346.

76. *See, e.g.,* Winterbottom v. Wright, 152 Eng. Rep. 402 (Ex. 1842).

In the first weeks of Basic Legal Skills, students are handed a line of product liability cases beginning with *Sexias v. Woods*⁷⁷ and ending with *MacPherson v. Buick Motor Co.*⁷⁸ The cases, taken from *Legal Method: Cases and Text Materials*,⁷⁹ are used to teach “a ‘feel’ for certain of the basic skills and arts of the case lawyer: [for example], the distinguishing of cases on their facts, the narrowing of an asserted precedent in terms of its procedural issue, the following of the distinguishable case.”⁸⁰ The first Basic Legal Skills assignments are to brief the cases and then discuss and write about the consistency, or lack of consistency, among them. The challenge is to separate holding from dictum, an “elusive” task.⁸¹ *Legal Method* presents *MacPherson* as an apparent departure from the previous cases because unlike them it held that a distant manufacturer who had no privity with the injured party could nevertheless be sued for harm caused by the manufacturer’s dangerous product. The instructor asked: “Is the decision [in *MacPherson*] consistent with the doctrine of *stare decisis*? Does it matter?”⁸²

The literary nature of judicial opinions offers one explanation for the inconsistency of holdings over time.⁸³ Nevertheless, methods other than those offered by mainstream legal thinking were not offered by Basic Legal Skills. The work in this class closely followed Professor White’s craft tradition of legal analysis.⁸⁴ Instead of exploring other literary aspects of the opinions read in those first weeks, the Basic Legal Skills curriculum assumed only that cases are “thought to present a series of reasoned positions that [are] available for analysis by anyone trained in simple [legal] operations.”⁸⁵ Although legal scholarship has continually branched out, such fields as Critical Legal Studies, Legal Realism, Feminist Legal Theory, and others had no place in the first weeks of Basic Legal Skills.

77. 2 Cai. Cas. 48 (N.Y. 1804) (ruling against plaintiff on appeal where buyer sued seller over purchase of mislabeled wood).

78. 111 N.E. 1050 (N.Y. 1916) (purchaser sued original manufacturer of automobile after crash was caused by defective tire).

79. Harry W. Jones et al., *Legal Method: Cases and Text Materials* 134–74 (1980).

80. *Id.* at 112.

81. *Id.* at 113.

82. Katherine O’Neill et al., University of Wash. Sch. of Law, *Syllabus for Basic Legal Skills 3* (Fall Quarter 1994) (unpublished manuscript on file with *Washington Law Review*).

83. For discussion on the literary nature of law, see *supra* text accompanying notes 8–14 and 26–29.

84. See *supra* text accompanying notes 10–16.

85. Mark Poster, *Interpreting Texts: Some New Directions*, 58 S. Cal. L. Rev. 15, 15 (1985).

B. Authority That Does Not Persuade: Levy in Winterbottom

*Winterbottom v. Wright*⁸⁶ set the course of product liability law for seventy-five years.⁸⁷ The defendant, a supplier of coaches, was sued by a separately-employed driver of horses who was injured when the coach collapsed.⁸⁸ The defendant and his attorneys described the possible horrors of liability extended without limit,⁸⁹ following the then current legal principle:

Now it is a general rule [said the defense], that wherever a wrong arises merely out of the breach of a contract, . . . the party who made the contract alone can sue. . . . If the plaintiff may, as in this case, run through the length of three contracts, he may run through any number or series of them.⁹⁰

The plaintiff argued, however, that the dangerous character of the defective coach breached the wall of privity and allowed the driver to claim damages against the coach owner.⁹¹

The tension between the defendant's view of limited liability and the plaintiff's view of expanded liability appeared in the discussion of *Levy v. Langridge*,⁹² an earlier case where an injured son was allowed to sue the gun seller even though his father purchased the injuring gun. Winterbottom argued that his case was governed by *Levy*.⁹³ This act of citation invested the precedent with authority simply by referring to it as written law. As any lawyer would, Winterbottom's attorney used this invested authority to hide an argument within the precedent; that is, he argued that these were not his original ideas but merely the application of the ideas of learned judges.

Nonetheless, the task faced by the lawyer is always to find precedent that, as well as being authoritative, is internally persuasive and applicable to this case. This search for persuasive precedent and its application to new fact patterns causes the meaning of the precedent to shift as it enters the new context. Whether or not the judge finds the precedent persuasive, the seed has been planted. From this moment forward, the precedent can

86. 152 Eng. Rep. 402 (Ex. 1842).

87. John W. Wade, *Strict Product Liability: A Look at its Evolution*, The Brief, Fall 1989, at 8, 11.

88. *Winterbottom*, 152 Eng. Rep. at 402-03.

89. Wade, *supra* note 87, at 10.

90. *Winterbottom*, 152 Eng. Rep. at 403 (citation omitted).

91. *Id.* at 404.

92. 150 Eng. Rep. 1458, 1459 (Ex. Ch. 1838).

93. *Winterbottom*, 152 Eng. Rep. at 404.

and will be imagined in this context. That imaginative act adds to the precedent's accumulation of legal meaning over time.

In other words, because the argument was made in *Winterbottom*, one can imagine the principles of *Levy* extending beyond the contract, even if the *Winterbottom* judges would not agree. The seed has been planted, although the fruitfulness of the legal soil may not appear at first.

In *Winterbottom*, the judge did not find *Levy* persuasive as it:

[W]holly fail[ed] as an authority in [the plaintiff's] favour; for there the gun was bought for the use of the son, the plaintiff in that action, who could not make the bargain himself, but was really and substantially the party contracting. Here the action is brought simply because the defendant was a contractor with a third person; and it is contended that thereupon he became liable to every body who might use the carriage.⁹⁴

Lord Abinger, the presiding judge, acknowledged the possibility that *Winterbottom's* suit might allow many more similar actions if allowed: "We ought not to permit a doubt to rest upon this subject, for our doing so might be the means of letting in upon us an infinity of actions."⁹⁵ Lord Abinger was amazed that *Winterbottom* had arisen despite "the precautions which were taken, in the judgment of this Court in the case of *Levy v. Langridge*, to obviate any notion that such an action could be maintained."⁹⁶ In anticipating the cases he wouldn't allow, however, Lord Abinger did not realize he planted the seeds for such cases' eventual success.

The difficulty of determining holding from dicta might explain why *Winterbottom's* attorneys brought the action. However, the judicial and legal process of characterizing the facts of cases more clearly explains how *Winterbottom* arose even though the *Levy* court clearly did not foresee such actions. The gun seller in *Levy* knew the gun's intended user was outside the contract between him and the purchaser, the user's father.⁹⁷ Therefore, *Winterbottom* characterized his case as representing a user known to exist outside the contract.⁹⁸ This characterization was designed to bring the case within the *Levy* rule. The closer the analogy between facts, the less noticeable the semantic shift of the cited

94. *Id.*

95. *Id.*

96. *Id.*

97. *Levy*, 150 Eng. Rep. at 1458.

98. *Winterbottom*, 152 Eng. Rep. at 404.

precedent. By carefully characterizing his own case, Winterbottom hoped the court would find the shift in *Levy*'s meaning acceptable. The court held that the coach-maker did not have knowledge similar to the gun seller's: Winterbottom suffers because "[t]he contract in this case was made with the Postmaster-General alone."⁹⁹ The court distinguished Winterbottom's contract from the one in *Levy*. However, by recognizing that the argument could be made, the court shifted the meaning of *Levy* such that it could no longer be read outside the context of the *Winterbottom* argument.

The *Winterbottom* court agreed with the defendant and erected the "citadel of privity" that limited product liability to those related by contractual privity for most of the next century.¹⁰⁰ By recording the plaintiff's idea of expected use and inherent danger, however, the court planted in *Winterbottom v. Wright* the seeds of that decision's overturn in *MacPherson v. Buick Motor Co.*¹⁰¹ The process, however, took place by a slow accretion of slight semantic shifts over the course of seventy-four years. The first shift occurred in *Thomas v. Winchester*¹⁰² when the New York Court of Appeals found an exception to the *Winterbottom* rule.

C. *Persuasion With No Authority: Winterbottom in Thomas*

After Mrs. Thomas almost died from ingesting poison mislabeled as medicine, she and her husband sued Winchester, the original manufacturer of the poison, who had sold it to a wholesaler who had then sold it to a pharmacist who had then sold it to Mr. Thomas.¹⁰³ The Thomases' relationship to the tortfeasor was even further removed than in *Winterbottom*, and therefore the defendant manufacturer claimed the case should fail.¹⁰⁴ Indeed, Chief Judge Ruggles agreed that the lack of contract would have prevented the suit under the *Winterbottom* precedent.¹⁰⁵ However, "the case in hand stands on a different ground"¹⁰⁶

99. *Id.* at 405.

100. Wade, *supra* note 87, at 11.

101. 111 N.E. 1050 (N.Y. 1916).

102. 6 N.Y. 381 (N.Y. 1852).

103. *Id.* at 382-83.

104. *Id.* at 384 ("[T]he action could not be sustained, as the defendant was the remote vendor of the article in question; and there was no connection, transaction or privity between him and the plaintiffs, or either of them.").

105. "If, in labeling a poisonous drug with the name of a harmless medicine, for public market, no duty was violated by the defendant, excepting that which he owed to Aspinwall, his immediate vendee, in virtue of his contract of sale, this action cannot be maintained." *Id.* at 386. The court went on to describe the *Winterbottom* action as the best example of the limit to product liability: "This was

because "[t]he defendant's negligence put human life in imminent danger."¹⁰⁷ Where Wright's duty arose from his contract with the Postmaster-General, Winchester's duty arose from "the nature of his business, and the danger to others incident to its mismanagement."¹⁰⁸

The creation of an exception for an imminently dangerous article was also attempted in *Winterbottom* when Winterbottom's attorney characterized the defectively manufactured coach as "necessarily dangerous."¹⁰⁹ That court, however, recognized only taking of a public duty or creating a public nuisance as exceptions to the privity required for a suit.¹¹⁰ In allowing the Thomases' action, Chief Judge Ruggles characterized Wright's duty as a public one: "Can it be said, that there was no duty on the part of the defendant, to avoid the creation of that danger, by the exercise of greater caution?"¹¹¹ This indirect quotation shifts the court's task from looking to see if the tortfeasor has accepted a public duty to imposing one on him as a matter of law.

Just as *Levy* allowed an exception to a general rule that lawyers tried to exploit in *Winterbottom*, lawyers later seized upon the public-duty exception opened in *Thomas. Loop v. Litchfield*¹¹² and *Devlin v. Smith*¹¹³ offer two examples of how positioning precedent allows or forecloses the success of that attempted exploitation.

First, in *Loop v. Litchfield*, the court discussed *Thomas* and recognized the public-duty exception.¹¹⁴ Although Loop attempted to describe the

the ground on which the case of *Winterbottom v. Wright* was decided. . . . The reason of the decision is best stated by Baron Rolfé: A.'s duty to keep the coach in good condition. was a duty to the postmaster-general [sic], with whom he made his contract, and not to the driver employed by the owners of the horses." *Id.* at 387.

106. *Id.*

107. *Id.* at 388.

108. *Id.* at 389.

109. *Winterbottom v. Wright*, 152 Eng. Rep. 402, 404 (Ex. 1842).

110. *Id.* at 405.

111. *Thomas*, 6 N.Y. at 388-89.

112. 42 N.Y. 351 (1870). Defendant sold a defective fly wheel, giving notice to the purchaser. Plaintiffs' decedent used the fly wheel with the purchaser's permission and was killed when the defect caused the wheel to burst. Plaintiffs sued defendant for causing death by negligence. *Id.* at 351-52.

113. 89 N.Y. 470 (1882). Defendant built a scaffold for the plaintiff's decedent's employer. While using it to paint a great height, the scaffold gave way, causing decedent's death. Acknowledging that no privity between defendant and decedent existed, the court nonetheless held that defective construction of the scaffold made it inherently dangerous to any workman using it. *Id.* at 478.

114. *Loop*, 42 N.Y. at 358-59.

“fly wheel in question [as] a dangerous object,”¹¹⁵ the court found his attempt unpersuasive:

Poison is a dangerous subject. Gunpowder is the same. A torpedo is a dangerous instrument, as is a spring gun, a loaded rifle or the like. They are instruments and articles in their nature calculated to do injury to mankind, and generally intended to accomplish that purpose. They are essentially, and in their elements, instruments of danger. Not so, however, an iron wheel¹¹⁶

Judge Hunt, for the *Loop* court, described *Thomas* in great detail;¹¹⁷ however, his description focused on a principle of liability not used by the *Thomas* majority. Although Chief Judge Ruggles discussed the criminal liability that would ensue had Mrs. Thomas died, he did not ascribe the civil liability on that basis. Rather, a duty arising from the marketing of medicines and poisons was the basis for liability.¹¹⁸ Nonetheless, Judge Hunt declared that the *Thomas* decision was founded on the crime of the negligent sale of poisons.¹¹⁹ This positioned *Thomas* as unpersuasive authority, similar to the way that the *Winterbottom* court positioned *Levy*. Where the *Winterbottom* court attempted to limit the meaning of liability, the *Loop* court attempted to limit the meaning of danger. Similarly, however, each attempt plants the seeds for a later court’s expansion of each discussed term’s meaning.

Second, in *Devlin v. Smith*, the court described *Thomas* with an entirely different characterization: “This liability [for selling a mislabeled poison] was held to rest, not upon any contract or direct privity between him and the party injured, but upon the duty which the law imposes on every one to avoid acts in their nature dangerous to the lives of others.”¹²⁰ Such a shift in emphasis alters the meaning of *Thomas* from the *Loop* court’s emphasis on danger to the *Devlin* court’s emphasis on duty. Again, the court will impose a duty upon the tortfeasor as a matter of law. This imposition, however, remained an exception to the general

115. *Id.*

116. *Id.* at 359.

117. *Id.* at 357–58. The description includes the description of *Winterbottom*, using Baron Rolfe’s alphabet characters without credit. *Id.* at 358.

118. *Thomas v. Winchester*, 6 N.Y. 381, 388–89 (1852). The concurring opinion, however, would have found liability because selling an unlabelled poison was a misdemeanor, but did not opine whether liability would result otherwise. Jones, *supra* note 79, at 142.

119. *Loop*, 42 N.Y. at 359.

120. *Devlin v. Smith*, 89 N.Y. 470, 477 (1882).

requirement of privity.¹²¹ By this time, *Winterbottom* had set the rule—privity was required in a suit for negligence—for forty years with few exceptions to that rule. *Winterbottom*'s authority would last for thirty more years before the context of the exceptions would overpower its holding and *Winterbottom*'s meaning would shift from rule to exception.

D. *Old Authority Abandoned While Persuasion Takes its Place:
Winterbottom and Thomas in MacPherson*

The state of American product liability law in 1903 was summarized in *Huset v. J.I. Case Threshing Machine Co.*¹²² Following *Winterbottom v. Wright*, liability was allowed without privity of contract under three exceptions: first, an imminently dangerous act of negligence; second, negligence causing injury to an invitee; and third, selling an imminently dangerous object without notice of the danger.¹²³ Finding only two cases, including *Devlin v. Smith*, that allowed liability outside these exceptions, Judge Sanborn declared:

It is, perhaps, more remarkable that the current of decisions throughout all the courts of England and the United States should be so uniform and conclusive in support of this rule, and that there should, in the multitude of opinions, be but one or two in conflict with it, than it is that such sporadic cases should be found. They are insufficient in themselves, or in the reasoning they contain, to overthrow or shake the established rule which prevails throughout the English speaking nations.¹²⁴

Only thirteen years later, this "established rule" would be overthrown in New York.

*MacPherson v. Buick Motor Co.*¹²⁵ involved a plaintiff who shared as little privity with the defendant as Mrs. Thomas shared with the negligent manufacturer; indeed, perhaps less. MacPherson purchased a car from a dealer who had purchased it from Buick. Buick had purchased the defective wheel from another manufacturer. The defects could have been discovered with reasonable inspection anywhere along the route from manufacture to accident.¹²⁶ There was no claim, however, of fraud: "The

121. *Id.* at 477–78.

122. 120 F. 865 (8th Cir. 1903).

123. *Id.* at 870–71.

124. *Id.* at 870.

125. 111 N.E. 1050 (N.Y. 1916).

126. *Id.* at 1050–51.

question to be determined is whether the defendant owed a duty of care and vigilance to any one but the immediate purchaser."¹²⁷

The question of duty of care had previously been phrased as a narrow exception from the requirement of privity; Chief Judge Ruggles considered *Thomas* such an exception.¹²⁸ However, Judge Cardozo, writing the *MacPherson* opinion, viewed *Thomas v. Winchester* as the rule not the exception: "The foundations of this branch of law, at least in this state, were laid in *Thomas v. Winchester*. . . . Because the danger is to be foreseen, there is a duty to avoid the injury."¹²⁹

After dismissing *Loop v. Litchfield* as a "narrow construction of the rule,"¹³⁰ Cardozo used *Devlin v. Smith* as the first example of later cases with "more liberal" applications of the *Thomas* rule.¹³¹ From this, Cardozo found that later cases may "have extended the rule of *Thomas v. Winchester*. If so, this court is committed to the extension. . . . [W]hatever the rule in *Thomas v. Winchester* may once have been, it has no longer that restricted meaning."¹³²

This shift from exception to rule had been presaged in the discussion of *Thomas* in *Devlin*. Indeed, it started in the discussion of *Levy* by Winterbottom's lawyers¹³³ and was warned against by Lord Abinger.¹³⁴ Lord Abinger feared that the expansive view of liability asked for by Winterbottom would open the door to many undesired actions.¹³⁵ Chief Judge Ruggles also wished to prevent undesired actions by limiting non-contractual actions to dangerous manufactures.¹³⁶ However, Cardozo quoted *Thomas* as rule, not exception, and shifted the meaning of *Thomas* and *Winterbottom*.

The key shift in meaning came from classifying the cases cited in *Thomas* as exceptions to the rule established in *Winterbottom*. Whereas Chief Judge Ruggles cited cases to show the limits of liability to which

127. *Id.* at 1051.

128. *Thomas v. Winchester*, 6 N.Y. 381, 389 (1852).

129. *MacPherson*, 111 N.E. at 1051 (citations omitted).

130. *Id.* at 1052. Cardozo also considered and dismissed *Losee v. Clute*, 51 N.Y. 494 (1873). *Losee* involved a third party injured by an exploding boiler who was found to have no claim against the manufacturer of the boiler; this case closely followed *Loop v. Litchfield*, 42 N.Y. 351, 358–59 (1870).

131. *MacPherson*, 111 N.E. at 1052.

132. *Id.*

133. *Winterbottom v. Wright*, 152 Eng. Rep. 402, 404 (Ex. 1842).

134. *Id.* at 404–05.

135. *Id.* at 405.

136. *Thomas v. Winchester*, 6 N.Y. 381, 387–89 (1852).

he found an exception, Judge Cardozo interpreted the cases as exceptions to the rule defined in *Thomas*. That is, he positioned *Thomas* as the authority under which persuasive exceptions were found. This move completed the ideological process of integrating the individual persuasive voice represented by *Thomas* with the authoritative voice of the judge announcing the law.

Bakhtin argued that the processes of assimilating other's discourse into one's own was a part of the process by which an individual determines "the very bases of our ideological interrelations with the world."¹³⁷ Part of this process is played out by encountering others' voices as authoritative discourse or bringing them to internally persuasive discourse.¹³⁸ In the development of the law, persuasive arguments that are contrary to the general rule of law are positioned as exceptions to that rule.¹³⁹ As exceptions develop and as the law develops new ideological relations with the society of which it is a part, those exceptions can be positioned as the rule, with the full authority of the law. The path of the *Levy* exception, particularly as it was developed in *Thomas*, illustrates that shift in position and the shift in meaning which accompanies it.

There can be many explanations for a court's meaning. Winterbottom's lawyers attempted to explain *Levy* in one way; the *Winterbottom* court explained it in another way. These different explanations of a case's meaning illustrate the legal heteroglossia that affects the meaning of any case because at any time the conditions of understanding a case's meaning will be different.¹⁴⁰ The shifts of meaning in the line of product liability cases following *Winterbottom* illustrate the usefulness of Bakhtin's theories in understanding this condition of change in legal meaning.

The Bakhtinian analysis demonstrated here will not reveal which seeds of shifting legal meaning will blossom. However, this analysis does reveal which seeds landed on fruitful soil by tracing the shifts in a constantly growing field of legal meaning.

137. *Discourse*, *supra* note 3, at 342.

138. *Id.*

139. See, e.g., *Huset v. J.I. Case Threshing Machine Co.*, 120 F. 865 (8th Cir. 1903).

140. Compare with the definition of heteroglossia, *supra* note 4.